No. 10740.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HUGH WILTON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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Jurisdiction.

The District Court had jurisdiction under Section 205(b) of the Emergency Price Control Act of 1942, as amended, 56 Stat. 23 (50 U. S. C. App. 901 *et seq.*) and Section 24 of the Judicial Code (28 U. S. C. 41(2)). The offenses charged in the information were committed in the City of Los Angeles, State of California, within the jurisdiction of the District Court. This Court has jurisdiction of the appeal under Section 128 of the Judicial Code (28 U. S. C. 225).

Statutes and Regulations Involved.

Sections 202(b) and 204(a) of the Emergency Price Control Act of 1942, as amended, 56 Stat. 23 (50 U. S. C. App. 901, *et seq.*) provide in part:

Section 202(b) (50 U. S. C. App. 902(b)):

> "Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he shall issue a declaration setting forth the necessity for, and recommendations with reference to, the stabilization or reduction of rents for any defense-area housing accommodations within a particular defense-rental area. * * * the Administrator may by regulation or order establish such maximum rent or maximum rents for such accommodations as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. * * *"

Section 204(a) (50 U. S. C. App. 904(a)):

> "(a) It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person * * * to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2 or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202(b) or section 205(f), or to offer, solicit, attempt, or agree to do any of the foregoing."

Maximum Rent Regulations 53 (7 Fed. Reg. 8596, 8 Fed. Reg. 7322) provides in part:

"Sec. 1388.281 Scope of Regulation. (a) This Maximum Rent Regulation No. 53 applies to all housing accommodations within * * *

(5) The Los Angeles Defense-Rental Area, consisting of the Counties of Los Angeles and Orange, in the State of California. * * *

Sec. 1388.282. Prohibition Against Higher Than Maximum Rents. (a) Regardless of any contract, agreement, lease or other obligation heretofore or hereafter entered into, no person shall demand or receive any rent for use or occupancy on and after the effective date of this Maximum Rent Regulation No. 53 of any housing accommodations within the Defense-Rental Area higher than the maximum rents provided by this Maximum Rent Regulation; and no person shall offer, solicit, attempt, or agree to do any of the foregoing. * * *

Sec. 1388.284 Maximum Rents. Maximum rents * * * shall be:

(a) For housing accommodations rented on March 1, 1942, the rent for such accommodations on that date. * * *

Sec. 1388.285 Adjustments and Other Determinations. In the circumstances enumerated in this section, the Administrator may issue an order changing the maximum rents otherwise allowable or the minimum services required. * * *

(a) Any landlord may file a petition for adjustment to increase the maximum rent otherwise allowable. * * *

Sec. 1388-287. Within 45 days after the effective date of this Maximum Rent Regulation No. 53, or within 30 days after the property is first rented, whichever date is the later, every landlord of housing accommodations rented or offered for rent shall file in triplicate a written statement on the form provided therefor to be known as a registration statement. The statement shall identify each dwelling unit and specify the maximum rent provided by this Maximum Rent Regulation for such other information as the Administrator shall require. * * *

Sec. 1388.293 * * *

(6) The term 'housing accommodations' means any building, structure, or part thereof, or land appurtenant thereto, or any other real or personal property rented or offered for rent for living or dwelling purposes, together with all privileges, services, furnishings, furniture, equipment, facilities and improvements connected with the use or occupancy of such property. * * *

(12) The term 'rooming house' means, in addition to its customary usage, a building or portion of a building other than a hotel in which a furnished room or rooms not constituting an apartment are rented on a short time basis of daily, weekly, or monthly occupancy to more than two paying tenants not members of the landlord's immediate family. The term includes boarding houses, dormitories, auto camps, trailers, residence clubs, tourist homes or cabins, and all other establishments of a similar nature.

(b) Unless the context otherwise requires, the definitions set forth in section 302 of the Emergency Price Control Act of 1942 shall apply to other terms used in this Maximum Rent Regulation.

Sec. 1388.294 Effective Date of the Regulation. This Maximum Rent Regulation No. 53 (Secs. 1388.281 to 1388.294, inclusive) shall become effective November 1, 1942.

Issued this 22d day of October, 1942.

Leon Henderson,
Administrator."

Statement of the Case.

On January 28, 1944, Charles H. Carr, United States Attorney for the Southern District of California, filed an information in seven counts in the United States District Court for the Southern District of California, Central Division, charging appellant with violations of the Emergency Price Control Act of 1942 (50 U. S. C. App. 902 *et seq.*), as amended, herein called the Act [R. 2-12].

Each count of the information charged that the defendant was the operator of a certain apartment building, and that he wilfully and unlawfully demanded and received from a designated tenant in a specified apartment in that building a rental which was in excess of the maximum rent permitted under the Maximum Rent Regulation (*supra*) duly promulgated under the Act.

On February 11, 1944, appellant entered a plea of not guilty to each of the counts, and on March 15, 1944, the cause was tried before the District Court and a jury [R. 13, 15-16]. At the close of the Government's case, the Court denied appellant's motion for dismissal of the information [R. 75]. Appellant then introduced evidence on his own behalf [R. 75 ff.], which was followed by

rebuttal evidence for the Government [R. 125 ff.]. The jury found appellant guilty upon all counts except count two, which had been dismissed during the trial upon motion of the Government [R. 16].

Thereafter, on April 3, 1944, the District Court sentenced appellant to imprisonment for a period of 90 days on count 1 of the information, and to pay a fine of $500 upon each of the other five counts, the receipt of $500 by the clerk of the Court to be in satisfaction of the fines imposed [R. 17-18].

Statement of Facts.

At all times material herein, appellant has been the operator and rental agent of certain conjoined premises at 435 and 441 North Figueroa Street, Los Angeles [R. 52], which constituted an apartment house or houses, and in which apartments were rented to various tenants.

Pursuant to applicable rent control regulations, sometime on or before January 15, 1943 [R. 43], appellant filed with the Office of Price Administration registration statements for rental dwellings showing the rentals charged on March 1, 1942, for each of the premises described in the information [R. 37-42, 54]. According to these statements, the premises in question were rented on March 1, 1942, at the monthly rental of $15 for apartment 3 [R. 41, 53][1] $17.50 for apartment 4 [R. 40, 53], $18 for apartment 10 [R. 38, 53], $18 for apart-

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[1]For convenience of the Court, we shall refer to the particular premises involved in the separate counts of the information by the apartment numbers which the owners of the buildings have assigned to them. These are apartments 3, 4 and 9 at 435 North Figueroa Street [R. 40-42], and apartments 10, 11 and 16 at 441 North Figueroa Street [R. 37-39].

ment 11 [R. 39, 53], and $16 for apartment 16 [R. 37, 52]. Between November 1 and December 1, 1942, appellant admittedly received a list of the above rentals for the apartments [R. 83, 84], and he personally prepared the rent registrations showing such rents [R. 114].

Since at least September, 1943, appellant was fully aware of the fact that in order to increase rents above the March 1, 1942, figure, approval had to be obtained first from the O.P.A. [R. 90-94, 115], and had previously petitioned the O.P.A., without success, for permission to increase the rentals [R. 89-94].

In September, 1943, appellant admittedly discussed with various persons at the local O.P.A. office his desire to re-register the apartment houses as rooming houses and to rent the rooms separately [R. 67-68, 93-95].[2]

Appellant was informed on this occasion that the premises would have to be inspected [R. 68, 97]. The inspection of the houses was made in the presence of the appellant that night [R. 51, 68, 70-73, 97-98]. The inspector told the appellant that the property was an apartment house and could not be considered a rooming house [R. 74-75].

Next morning the appellant returned to the O.P.A. office, where he was informed that his proposed registra-

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[2]Appellant had held similar discussions with O.P.A. officials also on other occasions [R. 88-93]. Appellant prepared new registration forms for the premises as rooming houses [R. 47-48, 49-50, 68].

tion of the property as a rooming house rather than as an apartment house, had not been approved [R. 44, 46, 49, 51, 69].

No such approval was ever accorded to the appellant [R. 69, 70, 126].

On October 30, 1943, appellant collected from the tenants therein $20.00, for rental of apartment 16 for the period of two weeks from September 28 to October 12, 1943 [R. 57-58, 112].

On December 1, 1943, appellant collected from the tenants therein $20.00 for rental for apartment 10 for the period of two weeks from December 1 to December 15, 1943 [R. 60-61, 112].

On December 20, 1943, appellant received from the tenant therein $10 as rental for apartment 11 for the period of December 18-25, 1943 [R. 7, 62-63, 112].

On December 11, 1943, appellant collected from the tenant therein $10 for rental of apartment 3 for the period of December 11-18, 1943 [R. 63-64, 112].

On December 6, 1943, appellant collected $10.00 from the tenant of apartment 4, as rental for the period of December 5-12, 1943 [R. 9, 65-66, 112].

On December 14, 1943, appellant collected $10.00 from the tenant of apartment 4 as rental upon the same apartment for the period December 12-19, 1943 [R. 9, 65-66, 112].

In each of these instances appellant issued a written receipt for the rental collected [R. 57-66].

Appellant admits that even prior to filing the proposed, but rejected, reregistrations of the premises in question in order to obtain permission from the O.P.A. to charge higher rentals, he had already charged the higher, illegal, rentals [R. 125].

Appellant testified on his own behalf [R. 84-125]. In the main, appellant's testimony was to the effect that he was informed by O.P.A. officials that his reregistrations had been approved and that he could charge the higher rentals.

In rebuttal, the O.P.A. officials named by the appellant flatly contradicted his testimony in this and other respects [R. 125-129; see also R. 35-36, 43-46, 51-52]. They testified also, in effect, that appellant was specifically informed that his "rent was frozen" [R. 129].

Questions Presented.

1. Is the evidence sufficient to support the conviction of appellant?

2. Did the trial judge commit error in instructing the jury. If so, was the error of such character as to require reversal of the judgment?

Summary of Argument.

1. The evidence is sufficient to sustain appellant's conviction under each count.

2. The trial judge properly instructed the jury.

ARGUMENT.

I.

The Evidence Is Sufficient to Sustain Appellant's Conviction Under Each Count.

Appellant asserts (App. Br. 8) that the evidence fails to sustain the jury's verdict of guilty. There is no merit to this assertion.

The evidence in this case is clear and unequivocal. The appellant knew the precise rents which he could charge for each apartment; he was not only given a list of the legal rents, but he himself filed apartment registration statements which he personally had prepared and in which he had inserted the applicable maximum rents.

Despite such unambiguous knowledge on his part, appellant nevertheless deliberately and wilfully charged rentals in excess of these permitted by law.[3] Appellant's own testimony in this case, in fact, fully establishes his guilt.

That appellant acted "wilfully" in the premises, is likewise patent on the face of this record.[4] For appellant not only knew the exact rents which he could charge under the law, but he also knew that in order to charge any

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[3]Appellant in reviewing in his brief the testimony of various witnesses in this case, in rearguing issues of credibility and reweighing all the evidence, obviously misconceives the function of this Court on an appeal. Appellant is entitled to no such consideration of these matters as he now seeks. See, *e. g., Womble v. United States,* 146 F. (2d) 263 (C. C. A. 9). And the evidence most favorable to the Government is clearly ample to support the jury's verdict on every count and to sustain the judgment below.

[4]See, *e. g., Zimberg v. United States,* 142 F. (2d) 132, 137 (C. C. A. 1), cert. den. 65 S. Ct. 38; *Di Melia v. Bowles,* 57 F. Supp. 710, 713 (D. C. D. Mass.); *Bowles v. Krasno Bros. Glove & Mitten Co.,* 59 F. Supp. 581, 583 (D. C. E. D. Wisc.); *Bowles v. Goebel* (D. C. N. D.) 58 F. Supp. 686; *Bowles v. Keane,* 47 N. Y. S. (2d) 347.

rentals in excess of those which were charged for the premises on March 1, 1942, it was first necessary to obtain official permission from the O.P.A. to reregister the premises. And appellant knew that no such permission had been granted to him.[5]

Nevertheless, and in the face of his crystal-clear knowledge respecting these matters, the appellant deliberately on numerous occasions charged and collected rentals in excess of the legal maximum, not only after his request for higher rentals had been rejected by the O.P.A., but even before he had filed the request.

Appellant's contentions to the effect that he spent large sums of money for renovation of the house are plainly not in point in this case. Maximum Rent Regulation No. 53 (*supra*) provides (Section 1388.285) a method by which a landlord may petition for an adjustment of rental where he has made a major improvement, and in other cases. However, appellant never filed an application for an adjustment under that nor any other section, except the application for registration for rooming house privileges discussed above, which was denied and appellant notified of the denial.[6]

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[5]Of course, appellant's contention that he received such permission is of no weight, since he was flatly contradicted in that respect by the O.P.A. officials in question; and the jury, which has the exclusive function of resolving conflicts in evidence, did not believe appellant's testimony in this respect, as is self-evident from the verdict of guilty.

[6]It need hardly be pointed out that whether the denial of appellant's application in the last noted respect was or was not proper, was not a matter for decision in a criminal prosecution for wilful violation of the Emergency Price Control Act of 1942, as amended, and applicable regulations under it. The denial of the application was purely an administrative matter under the Act, and was in no respect before the trial court or is before this Court in this case.

This case presents one of the clearer instances of wilful violation of the Emergency Price Control Act and its regulations. Appellant was in no sense confused or uncertain as to his obligations under the law. He merely chose to disregard them, and to charge the rental he thought he should receive.

There is manifestly no occasion to set aside the judgment here as unsupported by evidence.

II.

The Trial Judge Properly Instructed the Jury.

Appellant asserts that he was prejudiced by the trial judge's charge to the jury.

At the outset it should be noted that at the close of the charge, appellant made only one request for clarification [R. 144]. The trial judge thereupon further instructed the jury [R. 144-145]. Appellant's counsel then stated that he had "no other exceptions" [R. 145].

Obviously appellant has no standing to complain now that the charge was improper in any respect. Having failed to preserve an adequate record on appeal in this matter, appellant has no standing before this Court insofar as the charge is concerned.

However, even if appellant could raise that point now, it is without substance. In this connection appellant argues (App. Br. 29) that his client did not have knowledge of the terms of the rent control regulation, and that since the regulation was not offered in evidence, the jury could not see how "complicated" it was. This is no defense. The regulation was published in the Federal Register and did not have to be offered in evidence by the Government.

It is clear that while the trial Court did not read to the jury the regulation which appellant was charged with having violated, the formula instructions which the trial Court gave were plainly sufficient and fully apprised the jury of the necessary elements which had to be present to constitute the violations alleged in the information. These instructions translated the language of the regulation into simple, understandable tests by which the jurors were to determine the questions of fact and apply the law and thereby provided the jury with all of the material which a reading of the regulation could have supplied.

Anyway, the evidence clearly demonstrated that appellant was fully aware of all that was required of him under the regulations, and that he nevertheless wilfully violated them.

It would serve no useful purpose to reproduce here the detailed instructions given by the Court in this case. They appear in the record [R. 132-144], and we respectfully request the Court to examine them at this point, since they are demonstrably complete and protected the appellant in every essential respect.

Appellant's complaint (App. Br. 31) that the word "evidence" was omitted by the Court from its charge as the basis of conviction, is erroneous. The trial judge specifically in part told the jury: "You are to be governed, therefore, solely by the evidence introduced at the trial and the law as given you by the Court," also advising the jury that its function was to try the issues of fact [R. 134]. Further, the Court instructed the jury that it was its function to decide which testimony was true [R. 136-138] and that if it "believed beyond a reasonable doubt" [R. 138 ff], that appellant demanded and received the rents which he was charged in each count

with having collected, and that he "knowingly and wilfully" charged the higher rental, that the jury then was to find appellant guilty as to that count [R. 138 ff].

Obviously, under the existing law and on the basis of the rentals charged on March 1, 1942, if appellant wilfully charged the rents alleged in the information on the dates shown therein, he was guilty of the violations charged. And if the jury believed that he wilfully charged the higher rents and disbelieved his extenuating explanations, it had to find appellant guilty as charged.

The complaint by appellant (App. Br. 32-33) as to the charge regarding "wilfully" as applicable to this case [R. 138], is likewise without merit (see, *supra*, p. 10). Moreover the trial judge added the requirement of "knowingly" to "wilfully," thus placing upon the Government an added burden not required by the statute, to the appellant's benefit.

Obviously no merit attaches to appellant's added assertion (App. Br. 34-35) that the question of which regulation applied to appellant's premises, should have been left to the jury. There is no justification for the submission of such an issue to the jury. The sole benefit which might flow to appellant from the existence of different regulations would relate only to the issue of wilfullness. And on that issue the evidence is clearly against him, as we have shown above.

There was no error in the trial judge's charge to the jury.

Conclusion.

The evidence upon which the jury found appellant guilty plainly furnishes adequate support for that verdict. The trial Court committed no reversible error in its rulings, or in its instructions to the jury. Appellant has had a fair and full trial. There is no reason for setting aside the verdict and the lower court's judgment. The judgment should be affirmed.

Respectfully submitted,

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